



June 20, 2017

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667

**Via online submission**

**Re: FOIA Request for State Reports to EPA and EPA Reports to Congress on Water Quality Pursuant to 33 U.S.C.A § 1315**

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) (“the Requester”) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and implementing regulations, 40 C.F.R. § 2.100-2.406.

**I. Description of Records Sought**

Please produce records in the possession, custody, or control of the Environmental Protection Agency (“the Agency”) prepared pursuant to 33 U.S.C. §1315; specifically, please produce:

- Any and all reports made by each of the states and submitted to the Administrator of the Agency pursuant to 33 U.S.C. §1315(b)(1);
- Any analysis by the Agency of the adequacy of any state’s submission’s:
  - Description under 33 U.S.C. §1315(b)(1)(A);
  - Analysis under 33 U.S.C. §1315(b)(1)(B);
  - Analysis or recommendation under 33 U.S.C. §1315(b)(1)(C);
  - Estimates under 33 U.S.C. §1315(b)(1)(D); or
  - Description, recommendation, or estimate under 33 U.S.C. §1315(b)(1)(E);
- Any and all submissions made by the Agency to Congress pursuant to 33 U.S.C. §1315(b)(2).

For purposes of this request, the term “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind, including electronic as well as

**NATURAL RESOURCES DEFENSE COUNCIL**

40 W 20TH STREET | NEW YORK, NY | 10011 | T 212.727.2700 | F 212.727.1773 | NRDC.ORG

paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), reports, summaries, memoranda, consultations, papers, studies, notes, field notes, drawings, surveys, maps, graphs, charts, photographs, videos, meeting notes or minutes, bibliographies, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained.

Under FOIA, you are obligated to provide records in a readily-accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). We request that you provide the responsive records in electronic .pdf format without any “profiles” or “embedded files.” Please do not provide the records in a single or “batched” .pdf file. To the extent that a subset of the requested records is readily available, please provide that subset immediately while you continue to search for additional records to complete your response.

If you decide to invoke any FOIA exemptions in response to this request, please include in your response sufficient information for us to assess the basis for the exemption(s), including any interest(s) that would be harmed by release. Please include a detailed ledger which includes (1) basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and (2) complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of any requested records are exempt from disclosure, the FOIA requires that you produce any reasonably segregable non-exempt portions within the statutory time limit. *See* 5 U.S.C. § 552(b). For example, if you determine that any portions of any requested records are exempt under the FOIA’s deliberative process provision, 5 U.S.C. § 552(b)(5), you must produce any reasonably segregable portions of those records containing factual rather than deliberative material. *See, e.g., Gatore v. U.S. Dep’t of Homeland Sec.*, 177 F. Supp. 3d 46, 53 (D.D.C. 2016); *Gosen v. U.S. Citizenship & Immigration Servs.*, 118 F. Supp. 3d 232, 243-44 (D.D.C. 2015).

Please produce the records on a rolling basis. The Agency’s search for or deliberations concerning certain records should not delay the production of others that the Agency has already retrieved and elected to produce. If the Agency takes the position that any of these records are publicly available, please indicate where each of them may be found.

## **II. Request for a Fee Waiver**

Requester asks that the Agency waive any fee it would otherwise charge for the search and production of the records described above. FOIA provides that a requester is entitled to a fee waiver when “disclosure of the information is in the public interest because it [A] is likely to contribute significantly to public understanding of the operations or activities of the government

and [B] is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1) (EPA regulations mirroring the FOIA standard). The disclosure Requester seeks here meets both these requirements.

**A. Disclosure is likely to contribute significantly to public understanding of the operations or activities of the government**

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by the Agency evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. 40 C.F.R. § 2.107(l)(2).

**(a) The requested records concern the operations or activities of the federal government (40 C.F.R. § 2.107(l)(2)(i))**

The requested records directly “concern[] the operations or activities of the Federal government.” 40 C.F.R. § 2.107(l)(2)(i). The records pertain to the statutory obligation of each state to “prepare and submit to the Administrator” a report which includes an analysis of the water quality of waters in that state, as well as the measures and time needed to achieve water quality goals, and the costs and benefits of achieving such goals. 33 U.S.C.A. § 1315(b)(1). These records also pertain to EPA’s assessment of the state submissions. In addition, they pertain to the statutory obligation of the Agency to “transmit such State reports, together with an analysis thereof, to Congress” for review. 33 U.S.C.A. § 1315(b)(2). Disclosure of the records will provide valuable information as to the water quality in each state. It will help the public to evaluate the responses of each state and the Agency to this information and whether they have met their obligations to prevent water pollution and protect water quality.

**1. Disclosure is likely to contribute to public understanding of the government’s activities (40 C.F.R. § 2.107(l)(2)(ii)-(iv))**

Disclosure of the requested records is “likely to contribute to public understanding of those operations or activities” of the federal government. 40 C.F.R. § 2.107(l)(2)(ii). The records are likely to be “meaningfully informative,” as they directly relate to each state’s and the Agency’s obligation to preserve water quality and prevent water pollution. Because water quality affects the public health as well as the ability to enjoy natural surroundings, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.” *Id.* at § 2.107(l)(2)(iii). The records requested are directly relevant to the water quality of numerous waters in each state and, to our knowledge, have not all previously been made available. Their disclosure therefore will enhance “the public’s understanding of the subject in question . . . to a significant extent,” *id.* § 2.107(l)(2)(iv).

The American public has demonstrated a strong interest in water quality. All over the country, the public has become concerned about the ability of their government to ensure their water is not polluted, especially after high profile events such as the crisis in Flint, Michigan. In

fact, surveys frequently identify water quality as the top environmental concern. The fact that the public often lacks information about where their water comes from or how it is treated contributes to the concern. *See, e.g.,* Jason Evans, *Water Issues in Georgia: A Survey of Public Perceptions and Attitudes About Water*, CARL VINSON INSTITUTE OF GOVERNMENT, THE UNIVERSITY OF GEORGIA, ATHENS (2011); Colorado Watershed Assembly, *Public Opinions on Water Quality Issues* (2014); Justin McCarthy, *Americans' Concerns About Water Pollution Edge Up*, GALLUP (Mar. 17, 2016); Shea Gunther, *Top U.S. environmental concern: Water pollution*, MNN (Jun. 11, 2009); Tim Friend, *Water in America: Is it Safe to Drink?*, NATIONAL GEOGRAPHIC (Feb. 17, 2014).

Public interest is particularly strong with respect to information about drinking water. The information in the requested records may be particularly valuable in that regard for people in rural areas, because these reports should contain information such as “a description of the nature and extent of nonpoint sources of pollutants.” 33 U.S.C.A §1315(b)(1)(E). *See, e.g.,* *Groundwater Protection Recommendations Report*, MINNESOTA POLLUTION CONTROL AGENCY (Jan. 2016); Dina Gusovsky, *America's water crisis goes beyond Flint, Michigan*, CNBC (Mar. 24, 2016); Joan B. Rose, *America's Water Crisis Could Be Worse Than You Know*, TIME (Mar. 22, 2016); Maura Allaire, *Water Quality Concerns Extend Well Beyond Flint*, STATE OF THE PLANET (Nov. 2, 2016); Jacqueline Gullede, *Flint water crisis leaves long-term impact on children's health*, CNN (Jan. 31, 2017); Laura Ungar, *4 million Americans could be drinking toxic water and never know*, USA TODAY (Dec. 12, 2013).

In addition to drinking water, the public also has an interest in information regarding the quality of bodies of water used for recreational activities such as swimming or fishing. Engaging in these activities in contaminated water can have serious health consequences. Gabrielle Parent-Doliner, *What are recreational water illnesses?*, SWIM GUIDE (Aug. 5, 2016). The reports would assist the public with identifying contaminated water as well as with holding the government accountable. They require an analysis of whether bodies of water “allow recreational activities in and on the water,” recommendations to reach the quality that would enable those activities and an assessment of the costs and benefits of doing so. 33 U.S.C.A §§1315(b)(1)(B)-(D). With this information, the public could potentially identify and consider avoiding the bodies of water that might make them ill and determine whether their government is implementing plans to clean up pollution. *See* 40 C.F.R. § 2.107(l)(2)(ii) (requiring requester to show that the disclosure is likely to contribute to an understanding of government operations of activities).

NRDC does not seek the requested records for its own benefit. Rather, it seeks the records to provide new information to the public about water quality and the government's ability to meet its obligations to protect it. Disclosure will make possible a more complete public understanding of the progress of each state as well as the Agency and reveal areas where improvement is possible. Additionally, it will allow the public to better understand the water quality issues that directly impact their own communities. *See* 40 C.F.R. § 2.107(l)(2)(iii) (requiring requester to show that the “disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to” its own understanding).

As demonstrated by the foregoing, the American public has a strong interest in these reports. There is more than a reasonable likelihood that disclosure of the requested records will significantly increase public understanding of the government's actions on water quality among a broad audience of interested people. *See* 40 C.F.R. § 2.107(l)(2)(iv) (requiring the requester to show that the level of public understanding must be enhanced to a significant extent). *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

**2. Requester has the ability and intent to disseminate the information to a reasonably broad audience (40 C.F.R. § 2.107(l)(2)(iii))**

NRDC has both the ability and the intent to disseminate the information obtained through this request “in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject.” 40 C.F.R. § 2.107(l)(2)(iii). In addition, as discussed further in Section III below, Requester qualifies as a “representative of the news media” which are “presumed . . . to satisfy this consideration.” *Id.*

Requester has extensive experience disseminating public records and analysis to the public, media and decision makers and it routinely communicates with the public and the media on issues related to the water quality and the prevention of pollution. As discussed below, numerous articles, press releases, and websites attesting to the Requester's expertise on water quality issues are found on the internet and on its websites. The Requester intends to broadly disseminate the records, or summaries of the records, to the media, to their members and to the public.

NRDC has extensive communications capabilities and a proven history of disseminating information of public interest, including information obtained from FOIA requests. NRDC uses numerous modes of communication to disseminate information to its members and the public at large. These include: (1) NRDC's website (<http://www.nrdc.org>), which is updated daily and draws approximately 1.7 million page views and 1.5 million unique page views per month, and which features NRDC staff blogs, original reporting on environmental news stories, and in-depth analyses on topics of public interest; (2) NRDC's Activist email list, which includes more than 2.4 million subscribers who receive regular communications on urgent environmental issues; (3) *NRDC Insider* (<http://www.nrdc.org/newsletter>), a monthly electronic environmental newsletter distributed by email to more than 1.47 million subscribers; (4) NRDC's Facebook page, with more than 880,000; (5) NRDC's Twitter handle, with more than 262,000 followers; (6) NRDC's Instagram feed, with more than 97,000 followers; (7) NRDC's YouTube channel (<https://www.youtube.com/user/NRDCflix>), with more than 20,000 subscribers; and (8) online media outlets like Medium (<https://medium.com/natural-resources-defense-council>) and Huffington Post (<http://www.huffingtonpost.com/topic/natural-resources-defense-council>). NRDC also publishes legal and scientific analyses, policy documents, and reports; issues press releases; and directs and produces movies (including *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*). NRDC has more than fifty staff members dedicated to communications work.

In addition, NRDC employees and representatives are widely quoted in the news media; participate in interviews on television, radio, and web broadcasts; appear at conferences; provide

congressional testimony; and contribute articles and op-eds to numerous national newspapers, magazines, academic journals, and books. *See, e.g.,* Kristi Pullen Feinick *et al.*, *Threats on Tap: Widespread Violations Highlight Need for Investment in Water Infrastructure and Protections*, NRDC Report (2017); Amanda MacMilan, *What's in Your Drinking Water?*, NRDC (May 2, 2017); Steve Fleischli, *Your Day at the Beach Could Soon Lead to a Night at the Hospital*, THE ATLANTIC Feb. 1, 2012); Research Article, *The Requirement To Rebuild U.S. Fish Stocks: Is It Working?* MARINE POLICY (July 2014) (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell); Transcript, *Conservationists Call For Quiet: The Ocean Is Too Loud*, ALL THINGS CONSIDERED (July 28, 2013) (featuring NRDC Marine Mammal Protection Program Director Michael Jasny); Testimony of Johanna Wald, NRDC Senior Attorney, before the U.S. Senate Committee on Energy and Natural Resources, Hearing on the California Desert Protection Act of 2010 (May 20, 2010).

NRDC's legal and scientific experts routinely analyze information obtained through FOIA and use it to inform the public about a variety of environmental issues. *See, e.g.,* Theo Spencer, *The Fight to Stop a Strip Mine Near Bryce Canyon: A History*, NRDC Blog (June 5, 2017) (analyzing documents obtained through partner organization's FOIA request regarding a proposed expansion of an open pit strip mine in Utah); Kevin Bogardus *et al.*, *"Homework Assignment": How Pebble Lobbied Trump's EPA*, E&E NEWS (June 8, 2017) (quoting NRDC staff discussing results of a FOIA seeking communications between EPA and Pebble Mine developers); Tom Neltner *et al.*, *Generally Recognized as Secret: Chemicals Added to Food in the United States*, NRDC Report (2014) (analyzing FOIA documents relating to potentially unsafe chemicals added to food); Carmen Cordova, *Playing Chicken with Antibiotics*, NRDC Issue Brief (2014) (describing FDA records, obtained through FOIA, which show widespread violations of the agency's safety standards for antibiotic feed additives); Dan Flynn, *NRDC Releases FSIS Inspection Reports on Foster Farms*, FOOD SAFETY NEWS (Sept. 12, 2014) (reporting on documents NRDC obtained through FOIA relating to safety violations by poultry company, and linking to the documents); Mae Wu *et al.*, *Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, NRDC Report (2010) (analyzing White House documents obtained through FOIA and from other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine).

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and disseminate information obtained through FOIA to a broad audience of interested persons. Here, NRDC intends to disseminate any newsworthy information in the released records, along with its analysis of such records, to its members and to the broader public through one or more of the many communications channels referenced below. NRDC frequently publicizes newsworthy information for free, and it does not intend to resell the information requested here. NRDC has more than two million members and online activists. These members and activists, when combined with NRDC's communications to the public at large, clearly constitute "a reasonably broad audience of persons interested in the subject." 40 C.F.R. § 2.107(l)(2)(iii).

Thus, the Requester has the expertise and capacity effectively to analyze the requested records and to distribute the information contained therein to a broad audience. *See* 40 C.F.R. § 2.107(l)(2)(iii). Requester intends to disseminate this information to its members, online activists

and readers, and the general public in a manner that will meaningfully enhance the public's understanding. Requester's synthesis and dissemination of the information will contribute not just to their own understanding, but to the understanding of their members, other stakeholders, lawmakers, and a broad national audience of people who are interested in the quality of their water. To our knowledge, the records Requester seeks are not all publicly available. *See id.* § 2.107(l)(2)(ii). Their disclosure may therefore confirm, clarify, or contradict documents or statements in the public domain or actions taken by the federal government, and it will enable the public to better evaluate the federal government's actions. *Id.* § 2.107(l)(2)(ii)-(iii).

Accordingly, the Requester has met the first prerequisite for a fee waiver request under the FOIA.

**B. Disclosure is not primarily in the commercial interest of the Requester**

Second, Requester has no commercial interests that would be furthered by the requested disclosure. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). Therefore, it satisfies the second prerequisite for a fee waiver request under the FOIA.

The Requester is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted); *see also Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (recognizing that "[the fee waiver provision] was added to FOIA in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests, in particular those from journalists, scholars and nonprofit public interest groups." (internal quotation marks omitted)). The Requester wishes to serve the public by reviewing, analyzing, and disseminating newsworthy about the degree to which the Agency is ensuring the protection of water resources, and this is precisely the sort of "investigation[]" of "governmental choices and highlighting [of] possible abuses" for which the fee waiver was enacted. *Better Gov't Ass'n*, 780 F.2d at 93.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Requester's role of educating its members and the general public. The requester has over two million members and online activists. Requester has no commercial interest in the disclosure of the records and will realize no commercial benefit or profit from the disclosure of the requested records. In addition, as discussed further in Section III below, "when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure." 40 C.F.R. § 2.107(l)(3)(ii).

For these reasons, the Requester is entitled to a fee waiver under the FOIA.

### **III. Request for a Reduction of Fees**

In the alternative, even if the Agency denies Requester's fee waiver request, Requester qualifies as "representative[s] of the news media" who are entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

A representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (granting NRDC media requester status).

The Requester is in part organized and operated to gather and publish or transmit news to the public. As described in detail in Section II above, Requester publishes original reports and analyses on conservation-related topics on their websites, in their newsletters and magazines, and in blog posts; it contributes articles and op-eds to a variety of online and print platforms; and it maintains free online libraries of documents, publications, and other information of interest to the general public. These types of publications and media sources constitute news media outlets for purposes of FOIA. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that "as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities"). Public interest organizations performing these sorts of public communication functions "are regularly granted news representative status." *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 282, 287-89 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union); *see also Cause of Action v. Fed. Trade Comm'n*, 961 F. Supp. 2d 142, 164 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it "distributes work to an audience and is especially organized around doing so").

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by Requester to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of their publications or other suitable media channels. Requester will not resell the information obtained through this FOIA request to other media organizations. For these reasons, even if the Agency denies Requester's fee waiver request, it should grant a fee reduction consistent with 5 U.S.C. § 552(a)(4)(A)(ii).

### **IV. Willingness to Pay Fees Under Protest**

Please provide the records requested above regardless of your fee waiver decision. To expedite a response, Requester will, if necessary and under protest, pay fees in accordance with the Agency's FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv). Please contact me, however, before doing anything that would cause the fee to exceed \$250. Requester reserves the right to seek administrative or judicial review of any fee waiver denial.



#### **IV. Conclusion**

Please email or, if it is not possible to email, mail the requested records to me at the NRDC office address listed below.

If EPA concludes that any of the records requested here are publicly available, please let me know.

Please call or email me with any questions. Thank you for your time.

Sincerely,

A handwritten signature in blue ink, appearing to be 'J. Devine', with a stylized flourish at the end.

Jon P. Devine, Jr.  
Senior Attorney  
Water Program  
Natural Resources Defense Council  
1152 15th St NW, Suite 300  
Washington, D.C. 20005  
(202) 289-2361  
jdevine@nrdc.org

